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PRICE v. HALSTEAD — PASSENGERS HELD CIVILLY LIABLE FOR AIDING AND ABETTING AN INTOXICATED DRIVER

I. INTRODUCTION

There has been a growing trend in the United States which holds a third person accountable for the negligent acts of an intoxicated driver.[1] This trend has been catalyzed by activist groups such as M.A.D.D.[2] and S.A.D.D.[3] Before this trend, in absence of a special relationship between passenger and driver such as master-servant or joint enterprise, a cause of action did not exist against a passenger of an automobile when the driver acted negligently.[4] *Price v. Halstead*[5] exemplifies the expansiveness of drunk driving liability.

The *Price* decision recognizes a cause of action against the passenger of an automobile when the passenger substantially assists or encourages the driver in committing a tortious act.[6] Therefore, a passenger who substantially assists or encourages a driver to drive while intoxicated will be held liable to persons injured by the driver's negligence.

The holding of the West Virginia Supreme Court of Appeals in *Price* transformed public opinion into judicial opinion. As one analyzes the *Price* decision, one should be aware of the applicable law and statutes which the court did not address. Additional theories for holding the passenger liable for the acts of the intoxicated driver are discussed later.

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1. *See* Vance v. United States, 355 F.Supp. 756 (D. Alaska 1973) (cause of action against a commercial vendor); Coulter v. Superior Court, ___ Cal. 3d ___, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (cause of action against social host who serves alcohol to intoxicated persons).

2. Mothers Against Drunk Driving.

3. Students Against Driving Drunk.

4. 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 635 (1980).

5. Price v. Halstead, 355 S.E.2d 380 (W. Va. 1987).

6. *Id.* at 389.

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II. STATEMENT OF THE CASE

The factual scenario presented in this case is all too common today. On November 24, 1983, Kenneth C. Wall was driving a pick-up truck northbound[7] with Wall's wife and two minor children as passengers in the vehicle.[8] Stephen E. Garretson was driving his automobile in a southerly direction along with the defendants, passengers in the Garretson vehicle.[9] Garretson and the defendant passengers were consuming alcoholic beverages and smoking marijuana.[10] The defendant passengers were alleged to have been actively engaged in passing these substances to Garretson.[11] Garretson, driving under the influence of alcohol and drugs,[12] was traveling at an excessive rate of speed, lost control of his vehicle, and struck Wall's truck head on while attempting to pass another southbound vehicle.[13] As a result of the collision, Wall was killed, and his passengers received serious bodily injuries.[14] Consequently, Price, the administrator of Wall's estate, brought this action against the passengers of the Garretson vehicle.[15]

The court addressed the following four theories advanced by the plaintiff: joint venture, joint enterprise, negligence of the passengers for failing to remonstrate the driver, and substantial assistance or encouragement on the part of the passengers.[16] Agreeing with the lower tribunal, the court summarily dismissed the first three theories advanced by the plaintiff.[17] However, the Supreme Court of Appeals of West Virginia, recognizing the "Substantial Assistance or En-

7. *Id.* at 383.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. This violated W. VA. CODE § 17c-5-2 (1983).
13. *Price*, 355 S.E.2d at 383.
14. *Id.*
15. *Id.*
16. *Id.*
17. The court summarily dismissed the joint venture, the joint enterprise and the negligence theories advanced by the plaintiff.

couragement'' theory,[18] reversed the circuit court's decision[19] and remanded this case.[20]

III. PRIOR LAW

At common law, the terms joint venture and joint enterprise were sometimes used interchangeably.[21] However, these terms are separate and distinct from one another. A joint venture is a business enterprise for profit,[22] whereas a joint enterprise has no business motive and is not necessarily for profit.[23] Even though the two terms are distinct, it is common for a claim to be brought alleging that the passenger and driver were engaged in both a joint venture and a joint enterprise.[24]As a general rule, in the absence of a special relationship, such as a joint enterprise or a joint venture, an occupant of a motor vehicle other than the driver is not liable to a third person for the negligence of the driver.[25] However, when a joint enterprise or joint venture exists, liability for the negligent acts of the driver can be imputed to the passengers.[26] The critical element in deciding whether the driver and passenger are engaged in a joint enterprise is the right to control the vehicle.[27] A joint enterprise is not established by the mere fact that the driver and passenger were riding together to the same destination for the same purpose where the passenger had no voice in directing and controlling the operation of the vehicle.[28] The critical element in deciding whether the driver and passenger were engaged in a joint venture is whether the two were involved in a business enterprise for profit.[29]

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18. *Price*, 355 S.E.2d at 386-89.

19. *Id.* at 383. (The circuit court dismissed the action holding that the complaint failed to state a cause of action under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure).

20. *Id.* at 389.

21. *See* Horchler v. Van Zandt, 120 W. Va. 452, 199 S.E. 65 (1938).

22. *See* Nesbitt v. Flaccus, 149 W. Va. 65, 73-74, 138 S.E.2d 859, 865 (1964).

23. *See* Stogdon v. Charleston Transit Co., 127 W. Va. 286, 292, 32 S.E.2d 276, 279 (1944).

24. *See Price*, 355 S.E.2d at 383.

25. *See* 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 635 (1980), RESTATEMENT (SECOND) OF TORTS §§ 314, 315 (1960).

26. 7A AM. JUR. 2D *Automobiles, Traffic* § 634 (1980).

27. *Stogdon*, 127 W. Va. at 286, 32 S.E.2d at 276.

28. Frampton v. Consolidated Bus Lines, Inc., 134 W. Va. 815, 816, 62 S.E.2d 126, 132 (1950).

29. *Nesbitt*, 149 W. Va. at 65, 138 S.E.2d at 859.

In the absence of a special relationship, the Restatement (Second) of Torts holds a person liable for the negligent acts of another in certain instances.[30] Section 876(b) states that one is subject to liability for harm resulting to a third person from tortious conduct of another if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other.[31] Section 876(b) expressly states that the other's conduct must constitute a breach of duty.[32] West Virginia Code section 17c-5-2 places a duty on the driver of an automobile not to drive while intoxicated.[33] Therefore, an intoxicated driver breaches his duty under this protective statute.

Moreover, the court has concluded that if one engages in affirmative conduct and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, he is under a duty to exercise reasonable care to prevent the threatened harm.[34] *Robertson v. Lemaster*[35] afforded the court the opportunity to hold a third party liable for the negligent act of another when the third party created the risk of harm. In *Robertson*, the employer was found negligent because he sent his employee home, some fifty miles away, after the employee had worked for twenty-seven hours.[36] The employee caused an accident while he was driving home.[37] The employer was held liable, not on the respondeat superior doctrine, but on the theory that he created an unreasonable risk of harm.[38]

IV. ANALYSIS

At the beginning of his analysis, Justice Miller addressed Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, which requires a complaint to state a cause of action.[39] The court noted that

30. RESTATEMENT (SECOND) OF TORTS § 876(b) (1966).
31. *Id.*
32. *Id.*
33. W. VA. CODE § 17c-5-2 (1983).
34. Robertson v. Lemaster, 301 S.E.2d 563 (W. Va. 1983).
35. *Id.*
36. *Id.*
37. *Id.* at 564-66.
38. *Id.* at 564.
39. *See* W. VA. R. CIV. P. 12(b)(6).

under a previous decision, a complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove a set of facts in support of his claim which would entitle him to relief.[40] By recognizing the plaintiff's substantial assistance or encouragement theory, the court held that Price's complaint stated a cause of action.[41]

The court next addressed the question of whether, under the facts of this case, the driver and passenger were engaged in a joint venture or a joint enterprise. Justice Miller looked to the cases of *Nesbitt v. Flaccus*[42] and *Stogdon v. Charleston Transit Co.*[43] for guidance. In *Nesbitt*, the court stated that a joint venture was "an association of two or more persons to carry out a single business enterprise for profit. . . ."[44] Justice Miller examined the language of *Nesbitt* and stated that "there are no allegations in the complaint which would indicate that the occupants of the car were engaged in any type of business enterprise. Thus, the trial court was correct in dismissing this theory as a matter of law."[45]

In *Stogdon*, the court held that a common right to control the vehicle is a critical element in applying a joint enterprise theory to the driver and passenger of a motor vehicle.[46] The *Stogdon* court stated that "where there is no showing of a common right to control the use of an automobile, an instruction to the jury that it may return a verdict based upon the existence of a joint enterprise is erroneous."[47] Justice Miller recognized authority stating that a passenger can be held liable for the negligent acts of his driver if they were engaged in a joint enterprise.[48] However, Justice Miller did not consider a passenger and driver to be engaged in a joint enterprise where the passenger had no control over the vehicle and where the occupants were traveling together merely for social or recreational

40. *See* McGinnis v. Cayton, 312 S.E.2d 765 (W. Va. 1984).
41. *Price*, 355 S.E.2d at 389.
42. *Nesbitt*, 149 W. Va. at 65, 138 S.E.2d at 859.
43. *Stogdon*, 127 W. Va. at 286, 32 S.E.2d at 276.
44. *Nesbitt*, 149 W. Va. at 73-74, 138 S.E.2d at 865.
45. *Price*, 355 S.E.2d at 384.
46. *Stogdon*, 127 W. Va. at 286, 32 S.E.2d at 277.
47. *Id.*
48. *See supra* note 26.

purposes.[49] Justice Miller stated that "something more is required to invoke the doctrine [of joint enterprise] than an agreement to travel to a particular destination for a common purpose."[50] Justice Miller stated, "[I]t appears that the passenger and driver embarked on a common purpose, that of drinking and joy-riding. This, however, would not be the type of endeavor that would give rise to a joint enterprise."[51] The joint enterprise theory was then dismissed as a matter of law.[52]

The court next analyzed the negligence theory advanced by the plaintiff.[53] It is an often stated premise that a guest passenger in a motor vehicle may be guilty of contributory negligence if he fails to exercise reasonable care for his own safety by way of remonstrating the driver when the latter is driving in a negligent manner.[54] Justice Miller, discussing this premise, cited *Herold v. Clendennen*.[55] The court in *Herold* stated, "Under the laws of this State, the driver of an automobile owes to an invited guest reasonable care for his safety; but the guest must exercise ordinary care for his own safety. . . ."[56] Justice Miller, relying on West Virginia case law,[57] stated that the passenger of an automobile has a duty to exercise reasonable care for his own safety.[58] Recognizing this duty, Justice Miller continued, "[t]his duty to exercise reasonable care for his own safety cannot be converted into a general duty on the part of a passenger to exercise reasonable care toward third parties."[59] Therefore, without this duty on the passenger to exercise reasonable care toward third persons, the passenger is generally not liable for the negligence of the driver in the absence of a special relationship

49. *Price*, 355 S.E.2d at 385.

50. *Id.* (citing Frampton v. Consolidated Bus Lines, Inc., 134 W. Va. 815, 62 S.E.2d 126 (1950)).

51. *Price*, 355 S.E.2d at 385.

52. *Id.*

53. The Negligence Theory states that the passengers were negligent for allowing the driver to operate the car when they knew or should have known that the driver was intoxicated.

54. *Price*, 355 S.E.2d at 385.

55. Herold v. Clendennen, 111 W. Va. 121, 161 S.E. 21 (1931).

56. *Id.* at 121, 161 S.E. at 21.

57. *See* Hutchinson v. Mitchell, 143 W. Va. 290, 101 S.E.2d 73 (1957); Hurt v. Gwinn, 142 W. Va. 259, 95 S.E.2d 248 (1956); *Herold*, 111 W. Va. 121, 161 S.E. 21 (1931).

58. *Price*, 355 S.E.2d at 385.

59. *Id.*

such as a joint enterprise or a joint venture.[60] Justice Miller, by previously finding that there was not a joint enterprise or joint venture and that the duty on the passenger to exercise ordinary care for his own safety could not be converted into a general duty toward third persons, agreed with the lower tribunal's decision in dismissing the claim under this negligence theory.[61]

Finally, the court turned to the most significant issue presented in this case: whether a passenger can be held liable for the negligence of his driver, in the absence of a special relationship, if the passenger substantially assists or encourages the negligent conduct of the driver. The court relied upon the Restatement (Second) of Torts[62] for assistance. Section 876(b) of the Restatement (Second) of Torts states that, "one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other as to conduct himself."[63] This theory is sometimes termed aiding and abetting a tort and is by no means novel.[64]

In the court's analysis, the Restatement (Second) of Torts and American Jurisprudence were examined.[65] Moreover, the court relied on *Robertson v. Lemaster*.[66] In *Robertson*, the court concluded that "one who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm."[67] In his analysis, Justice Miller stated that, "the facts are even more egregious than in *Robertson* as the passengers are alleged to have directly participated and to have encouraged the driver to continue to drink and smoke marijuana when he was already visibly intoxicated."[68]

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60. 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 635 (1980).
61. *Price*, 355 S.E.2d at 386.
62. *See supra* note 28.
63. *Id.*
64. *Price*, 355 S.E.2d at 386.
65. *See supra* note 28 and 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 635 (1980).
66. *Robertson*, 301 S.E.2d at 563.
67. *Id.* at 567.
68. *Price*, 355 S.E.2d at 387.

The driver of an automobile has a civil duty under the West Virginia Code section 17c-5-2 not to drive while intoxicated. In the present case, the driver allegedly breached a civil duty by driving while intoxicated[69] and was encouraged to do so by the passengers. Moreover, the passengers, by encouraging the driver to continue to drink alcohol, smoke marijuana, and drive while intoxicated, created an unreasonable risk of harm to another.[70]

In its analysis, the court examined more than the case law or written authority in this case. The court also analyzed the strong public policy that has recently developed in the drunk driving area. Justice Miller stated, "[f]urthermore, if there is any area of social policy on which there has been virtual unanimity of agreement between courts and legislatures it is the need to stem the tide of injuries and deaths arising from driving under the influence of alcohol and drugs."[71] The court's strong commitment to the reduction of accidents involving drunk driving has led to an expansion of tort law in this field.[72] The case at hand emphasizes the court's commitment to implement public policy and to "stem the tide of injuries and deaths arising from driving under the influence of alcohol and drugs."[73]

The West Virginia Supreme Court has developed a rule stating that a passenger will be held liable for the negligence of his driver if:

> (1) the driver was operating his vehicle under the influence of alcohol or drugs which proximately caused the accident resulting in the third party's injuries, and
> (2) the passenger's conduct substantially encouraged or assisted the driver's alcohol or drug impairment.[74]

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69. W. VA. CODE § 17c-5-2 (1983).

70. *Cf. Robertson*, 301 S.E.2d at 563.

71. *Price*, 355 S.E.2d at 387.

72. *See* Walker v. Griffith, 262 F.Supp. 350 (W.D. Va. 1986) (cause of action against tavern owner); Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985) (cause of action against social host).

73. *Price*, 355 S.E.2d at 387.

74. *Price*, 355 S.E.2d at 389. *See also* West Virginia v. Bartlett, 355 S.E.2d 913 (W. Va. 1987) (Causation is inferred once you show the driver was intoxicated, the vehicle was driven in a negligent manner, and that the accident occurred).

After reviewing the facts of the case and implementing the newly developed rule, the court found that the plaintiff's allegations that the passengers substantially assisted the driver in driving while intoxicated by passing him alcohol and marijuana stated a cause of action.[75] Consequently, the judgment of the circuit court was reversed and the case remanded.[76]

The facts of this case enabled the court to apply section 876(b) of the Restatement (Second) of Torts. However, the court failed to utilize existing legislation and law which clearly would have enabled it to arrive at the same conclusion. For instance, the violation of a West Virginia statute creates a cause of action.[77] Furthermore, the violation of a provision of the West Virginia motor vehicles statute is prima facie evidence of negligence.[78] The passengers in this case seemingly violated two West Virginia statutes.[79] West Virginia Code section 60-6-9 states, in part, that a person shall not drink alcoholic beverages in a motor vehicle on any highway, street or alley, or any public garage.[80] The driver and passengers were allegedly engaged in the consumption of alcohol while they were traveling on a public street.[81] Therefore, the driver and passengers violated section 60-6-9. In addition, West Virginia Code section 60-6-16 provides "[a] place where alcoholic liquor is . . . given away, or furnished contrary to law shall be deemed a common public nuisance."[82] The driver and passengers furnished beer in an automobile while driving on a public street, which is contrary to law. Therefore, by reading these sections together, the driver and passengers violated section 60-6-16.

The court also could have applied the conspiracy doctrine in this case to create a cause of action against the passengers in the Garretson vehicle. "A conspiracy is a combination of two or more per-

75. *Id.*
76. *Id.*
77. *See* W. VA. CODE § 55-7-9 (1983).
78. *Cf.* Kretzer v. Moses Pontiac Sales, Inc., 157 W. Va. 600, 200 S.E.2d 275 (1978).
79. *See* W. VA. CODE §§ 60-6-9, 60-6-16 (1935).
80. W. VA. CODE § 60-6-9 (1935).
81. *Price*, 355 S.E.2d at 383.
82. W. VA. CODE § 60-6-16 (1935).

sons by concerted action to accomplish an unlawful purpose. . . ."[83] As previously mentioned, West Virginia Code section 60-6-9 states that the consumption of alcohol in a motor vehicle on a public highway is unlawful. Furthermore, West Virginia Code section 60-6-16 states:

> If two or more persons conspire to maintain such common and public nuisance . . . give away, or furnish alcoholic liquor in violation of any of the provisions of this chapter, and one or more of such persons do any act to effect the object of this conspiracy, each of the parties to such conspiracy shall be guilty of a misdemeanor.[84]

The driver and passengers were acting in concert if they all participated in drinking alcohol while driving on a public highway. The passengers, by furnishing beer to the driver, were carrying out an unlawful act. Therefore, there was a conspiracy to drink alcohol on a public highway, and the passengers, by furnishing beer to the driver, performed an act that effected this conspiracy. Thus, the passengers violated section 60-6-16. Also, all parties involved in the conspiracy are accountable for injuries to third persons as a result of the conspiracy.[85]

Alternatively, the court could have relied on section 876(c) of the Restatement (Second) of Torts. Section 876(c) provides that, "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."[86] The passengers, by furnishing the driver with alcohol and drugs, clearly gave substantial assistance to the driver in committing the tortious act, specifically, the fatal collision caused by the negligence of the driver. West Virginia Code sections 60-6-9 and 60-6-16 are statutes dealing with alcohol and intoxication. Intoxication statutes serve as a protection against offenders who endanger the well being of themselves or others.[87] In the present

83. Dixon v. American Indus. Leasing Co., 162 W. Va. 832, 253 S.E.2d 150 (1979).

84. W. VA. CODE § 60-6-16 (1935).

85. *See generally* W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS 322-55 (5th ed. 1984).

86. RESTATEMENT (SECOND) OF TORTS § 876(c) (1966).

87. State v. Runner, 310 S.E.2d 481 (W. Va. 1983).

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case, the passenger's own conduct, by violating these West Virginia Code sections, breached a duty to the third persons. Hence, section 876(c) of the Restatement (Second) of Torts could be applied in this case.

IV. CONCLUSION

The holding in this case represents an expansion of tort law that attempts to reduce the number of accidents caused by persons driving under the influence of drugs and alcohol. Drinking and driving is not socially accepted, and the public concern is growing rapidly. The public's outcry to reduce drunk driving has come to fruition in this case. The court took this opportunity to convert public opinion into judicial opinion.

The West Virginia Supreme Court, in deciding this case, expanded *Robertson v. Lemaster*[88] and seemed to follow the Restatement (Second) of Torts section 876(b). However, a cause of action against the passengers could have been found on existing statutes. West Virginia Code section 55-7-9 states that a cause of action arises when a West Virginia statute is violated. West Virginia Code sections 60-6-9 and 60-6-16 were violated in this case. Furthermore, the court could have applied a conspiracy theory against the passengers or used the Restatement (Second) of Torts section 876(c). The holding in this case is not a radical evolution in the law. The court recognized the theory of aiding and abetting a tort and applied it to the area of drunk driving. With this decision, the court is simultaneously attempting to decrease the number of accidents caused by intoxicated drivers and increase the number of persons liable for those accidents.

Joseph J. John

88. *Robertson*, 301 S.E.2d at 563.